

1001 G Street, N.W.
Suite 500 West
Washington, D.C. 20001
tel. 202.434.4100
fax 202.434.4646

August 22, 2006

Hon. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423

ENTERED
Office of Proceedings

AUG 23 2006

Part of
Public Record



Re: The Louisiana and North West Railroad Company, Discontinuation of Service at Magnolia, Arkansas, STB Docket No. ____; Petition of Albemarle Corporation for Emergency Service Order and Petition of Albemarle Corporation for Immediate Relief under 49 U.S.C. § 721(b)(4)

Dear Secretary Williams:

On behalf of Albemarle Corporation, we are submitting herewith a Rebuttal to the reply filed by The Louisiana and North West Railroad Company ("LNW") on August 21, 2006 ("Reply") to Albemarle's Petitions identified above, filed on Friday, August 18, 2006.¹

As set forth in the Petition for Emergency Service Order ("ESO Petition"), LNW's Tariff 8002-E covers switching service. That tariff is before the Board in Docket No. 42096 for a determination of the reasonableness of LNW's rates and practices, on referral from the United States District Court for the Western District of Arkansas.² In its Reply, LNW offers what is understood to be a contract to govern the provision of switching service, which would be at a rate lower than the tariff rate. While Albemarle is willing to receive service under the tariff, and to sort out the level of charges and the minimums through the pending litigation before the Board and in the underlying Federal District Court proceeding,³ LNW now asks Albemarle to "accept [a proffered] rate arrangement"⁴ and seeks having Albemarle "accept LNW's rate proposal in

¹ This Rebuttal is filed in accordance with Section 1146.1(b)(3) of the Board's rules. With LNW having replied as permitted by Section 1146.1(b)(2) and this Rebuttal, Albemarle submits that the pleading cycle is closed.

² Albemarle Corporation—Petition for Declaratory Order—Certain Rates and Practices of The Louisiana and North West Railroad Company (Feb. 1, 2006).

³ These factors distinguish the Keokuk Junction case cited by LNW in its Reply at p. 1. There, Keokuk sought an emergency service order in lieu of bringing a challenge to the incumbent's rates and terms of service. Accordingly, the Keokuk Junction decision has no bearing on Albemarle's ESO. Indeed, it is LNW which seeks to turn this into a rate dispute by raising the issue of rates before the Board in its Reply and inappropriately invoking confidential settlement matters.

⁴ Reply at p. 1.

KELLER AND HECKMAN LLP

Hon. Vernon A. Williams

August 22, 2006

Page 2

writing by Tuesday, August 22.”⁵ In the absence of Albemarle accepting the contract offer, “LNW . . . will no longer provide intra-plant switching service for Albemarle and will resist any attempt by Albemarle to force an unqualified third party contractor onto the LNW main line.”⁶

It is clear from the foregoing that LNW is refusing to provide service under its tariff. Albemarle would welcome LNW reducing its tariff rate to \$400.00 while we continue to address the reasonableness of that rate and the conditions imposed, if this matter can not be settled. It is further clear that in the absence of a contractual agreement, LNW will forthwith stop providing the switching.⁷ Contractual arrangements for transportation service are consensual in nature; and inasmuch as the Board does not have jurisdiction over railroad transportation contracts, 49 U.S.C. § 10709, LNW’s offer of a contract is irrelevant as a defense to its threat to terminate service and to performance of its duty as a common carrier under 49 U.S.C. § 11101(a).

It is further clear from LNW’s letter that the service at issue here entails the provision of switching service over LNW’s main line track, which bridges between Albemarle’s storage tracks and the plant itself.⁸ This is not purely an intra-plant switch, which LNW has argued is not subject to the STB’s jurisdiction. Indeed, that is the origin of the immediate problem—Albemarle is conducting its own switching within its plant, and LNW wants that traffic back and is using service to the storage track as leverage with its “all or nothing” demand.⁹

LNW asserts it will “resist any attempt by Albemarle to force an unqualified third party contractor onto the LNW main line.”¹⁰ Ouachita Railroad, which has offered to provide the switching service to Albemarle, is a Class III railroad, and is highly qualified to provide the service at issue. As noted in the ESO Petition, LNW suggested the alternative of a third party providing the switching in a pleading before the Board.¹¹ LNW has yet to identify what qualifications would make a third party acceptable to LNW, and its Reply to the Board suggests that no entity would be satisfactory.

⁵ *Id.* at p. 2.

⁶ *Id.* at p. 1.

⁷ LNW provided switching on Monday, August 21, 2006, but subsequently has clarified—including in its Reply—that it is insisting on a contract arrangement.

⁸ The track configuration is described in the Declaration of Danny Wood at p.1 and Exhibit A thereto, associated as Exhibit 7 to Rebuttal of Albemarle Corporation to Reply of The Louisiana and North West Railroad Company, Docket No. 42096 (April 10, 2006).

⁹ See Reply; see also Exhibit A to ESO Petition.

¹⁰ Reply at p. 1.

¹¹ See ESO Petition at p. 5.

KELLER AND HECKMAN LLP

Hon. Vernon A. Williams

August 22, 2006

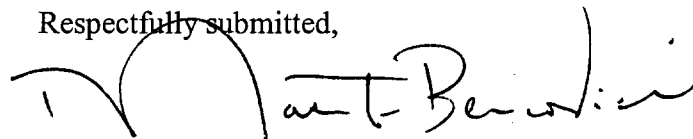
Page 3

Further, LNW claims that Albemarle "cannot claim that there has been any measurable deterioration in the adequacy of LNW's intra-plant switching over an extended period of time."¹² First, the repeated threats of abrupt termination of service are highly disruptive to planning and operation of Albemarle's plant. That in itself is a deterioration of service. In addition, the statute does not require deterioration of service over "an extended period of time," but rather allows an emergency service order to be issued in response to an "unauthorized cessation of operations." 49 U.S.C. § 11123(a). LNW's announced intent to abruptly and unlawfully terminate service certainly qualifies for remedial action. Anticipatory breach of duty—particularly when the intent is clearly articulated by the breaching party—is well recognized as actionable in American jurisprudence.

Finally, Albemarle submits that the issue of the risk of handling hazardous materials is irrelevant to the ESO Petition. All switching is conducted within the Albemarle plant boundaries. The switching service is not performed in, through, or near towns or residential areas. Nor is there any nearby LNW plant or facility, other than its tracks and its switch engines when they are present. Albemarle's plant routinely handles hazardous materials. The reference to "catastrophic risk" is pure hyperbole.

Albemarle Corporation respectfully urges the Surface Transportation Board to accept LNW's threat of imminent cessation of switching operations at face value, to find that immediate agency action is necessary to prevent the disruption of transportation service, and promptly to authorize the Ouachita Railroad Company to operate over the lines of the LNW for the purpose of providing switching service between Albemarle's plant and its storage tracks.

Respectfully submitted,



Martin W. Bercovici

cc: Edward J. Fishman, Esq. (via hand delivery)
Ouachita Railroad Company (via electronic mail)
Federal Railroad Administration (via hand delivery)

¹² Reply at p. 1.